

Zhang v. Mukasey, No. 05-75907

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LEAVY, Circuit Judge, dissenting:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I dissent. This is not a case where a the IJ improperly relied upon an inconsistency forming the basis of a denial of asylum without giving the alien a “reasonable opportunity to offer an explanation.” *See Chen v. Ashcroft*, 362 F.3d 611, 618 (9th Cir. 2004). In this case, Zhang testified before the IJ that he did not practice Falun Gong, either in China or in the United States. Zhang then called a witness, who, upon questioning by the IJ, testified unambiguously that Zhang had told him he practiced Falun Gong in Los Angeles. Zhang’s attorney neither examined the witness on redirect nor recalled Zhang to the witness stand. This obvious inconsistency took place before the IJ and in the presence of Zhang and his attorney. Zhang had the perfect time, place, and opportunity to explain.

The IJ stated she “must conclude that [Zhang’s] testimony is not credible,” noting:

[T]he crowning blow to respondent’s case was his witness’ testifying that, in fact, the respondent has practiced Falun Gong in Los Angeles. The respondent testified to this Court quite clearly in his first breaths here that he has not been a practitioner but only has spoken out in support of Falun Gong.

The BIA affirmed the IJ’ adverse credibility determination, stating:

[T]estimony relating to the respondent’s alleged Falun Gong association, which involves the basis of the respondent’s alleged fear of persecution, provided the Immigration Judge with legitimate reason

to question the veracity of respondent's claim. The respondent on appeal has not offered a convincing explanation for those material discrepancies.

(Internal citation omitted).

The majority, without authority, places a new burden on the government to recall Zhang to the stand and afford him an "opportunity to explain" the direct contradiction between his testimony and that of his own witness. Zhang also failed to offer any explanation in his brief to the BIA. Zhang's only explanation to this court is that he "could not control" what his witness said. This case is clearly distinguishable from *Chen, Guo v. Ashcroft*, 361 F.3d 1194, 1199 (9th Cir. 2004), and *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999), because none of these "opportunity to explain" cases involves a witness whose testimony is contrary to the alien's testimony while in the presence of the IJ.

Because the adverse credibility determination is supported by substantial evidence, I would deny the petition.